IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.12.2007

Coram :

The Honourable Mr.Justice K.N.BASHA

Crl.A.No.740 of 1998

Bipin Mehta .. Appellant/Complainant

Vs

Chandra Mohan .. Respondent/Accused

Appeal filed against the order of acquittal dated 31.03.1997 made in C.C.No.4801 of 1993 on the file of VIII Metropolitan Magistrate, Chennai.

For Appellant : Mr. K.P.Anantha Krishna
For Respondent : Mrs.Juliet Pushpa,
Legal Aid Counsel.

JUDGMENT

This appeal is preferred by the complainant challenging the order of acquittal passed by the learned VIII Metropolitan Magistrate, Chennai in C.C.No.4801 of 1993, dated 31.03.1997 acquitting the accused for an offence under Section 138 of the Negotiable Instruments Act.

2.It is seen that the complainant has filed the complaint for an offence under Section 138 of the Negotiable Instruments Act against the respondent, who was the sole accused in this case. The case of the appellant/complainant is that he has given a loan of Rs.6,00,000/- on 14.03.1993 to the respondent/accused. The complainant has also obtained a pro-note from the accused. While the complainant demanded the repayment of the loan amount, the accused issued a cheque, dated 10.05.1993 for an amount of Rs.6,00,000/- drawn on State Bank of India, Kannanur, which is marked as Ex.P.1. Thereafter, the complainant deposited the said cheque under Ex.P.2 in a bank viz., Canara Bank. The complainant stated that on the deposit of the cheque, Ex.P.1, the same was dishonoured on the ground of

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insufficiency of funds as per the bank memo Ex.P.2 and also proprietary incorrect. Ex.P.3 is the bank memo sent from the complainant's Bank. Thereafter, the complainant sent a statutory notice under Ex.P.4 and the same was returned with an endorsement as not claimed and the returned cover was marked as Ex.P.5. The appellant/complainant also followed the mandatory requirements contemplated under Section 138 of the Negotiable Instruments Act, as the cheque was presented within the period viz., within a period of six months and the complaint was also filed within the stipulated time under Section 138 of the Negotiable Instruments Act.

3.The complainant in order to prove his case, examined three witnesses including himself and also marked five exhibits as stated above viz., Exs.P.1 to P.5.

4.When the accused was questioned under Section 313 Cr.P.C. in respect of the incriminating materials made appearing against him, the accused has come forward with the version of total denial and he has stated that he has been falsely implicated in this case. The accused has not chosen to examine any witness on his side.

5.The learned trial Magistrate on consideration of the entire evidence available on record has come to the conclusion that the appellant/complainant has not proved the case by adducing clear and cogent evidence and held that the offence under Section 138 of the Negotiable Instruments Act is not made out against the respondent/accused and acquitted the accused. Being aggrieved against the order of acquittal, the present appeal is filed by the complainant.

6.Mr.K.P.Anantha Krishna, the learned counsel appearing for the appellant/complainant contended that the impugned order of acquittal is unsustainable in law, as the learned Magistrate has overlooked the materials available on record against the accused. It is submitted that the learned Magistrate has not assigned any valid reason for acquitting the accused. The learned counsel pointed out that the learned Magistrate rejecting the case of the appellant/complainant acquitted the accused on three grounds viz.,

1)The statutory notice as contemplated under Section 138-B of the Negotiable Instruments Act was not served on the accused, as the registered post was returned with an endorsement "not claimed".

2)The complainant has not produced any evidence to show towards which loan, the disputed cheque Ex.P.1 was issued in favour of the complainant.

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3)The pro-note on which the loan amount was given was not produced before the Court.

4)The cheque Ex.P.1 was said to have been issued by the accused on behalf of the partnership firm viz., "Southern Well Products" and as such, the complaint itself is not maintainable as the partnership firm was not implicated as one of the accused.

7.The learned counsel appearing for the appellant/complainant would contend that all the above said reasons assigned by the learned Magistrate are unsustainable in law, in view of the fact that admittedly, the statutory notice was sent to the correct address of the accused, as the accused has not disputed the address mentioned in the cover and the postal cover was returned only with an endorsement "as not claimed" and therefore, in view of the settled principles of law laid down by the Hon'ble Apex Court, the statutory notice must be deemed to have been served on the accused in view of Section 27 of the General Clauses Act. In respect of non-production of pro-note, the learned counsel would contend that in view of the fact that the accused has not disputed the signature in the cheque, Ex.P.1 and as such, the presumption clause under Section 139 of the Negotiable Instruments Act, is to be considered as, once the cheque is issued in favour of the complainant, it has to be presumed that the said cheque was issued only towards the legally enforceable liability and therefore, merely because, the pro-note was not produced before the Court, the accused cannot claim that he cannot lift the presumption and as such, the non-production of pro-note is not fatal to the complainant's case. In support of his contention, the learned counsel for the appellant placed reliance on a decision of the Andhra Pradesh High Court reported in 2006 Crl.L.J. Page 1 (Gorantla Venkateswara Rao Vs. Kolla Veera Raghava Rao and another). The last submission of the learned counsel for the appellant is that even the reason assigned by the learned Magistrate that the non-impleading of the partnership firm of the accused viz., Southern Well Products is also not fatal to the case of the complainant, in view of the settled position of law that the accused is none other than the partner of the said firm.

8.Per contra, Mrs.Juliet Pushpa, the learned counsel appearing as Legal Aid counsel for the respondent/accused contended that there is no illegality or infirmity in the impugned order of acquittal. It is submitted that the learned Magistrate has assigned valid reasons for acquitting the accused. It is contended by the learned counsel that if at all there is any genuine liability on the part of the accused, the complainant could have very well produced the pro-note as the complainant claimed that the loan was given only

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on pro-note as per his complaint. He has not assigned any reason to withheld the said document and as such adverse inference should be drawn against the case of the complainant. It is also submitted that the non-impleading of the partnership firm as admittedly the accused has signed in the cheque only on behalf of the partnership firm, is also fatal to the prosecution case.

9. I have carefully considered the rival contentions put forward by the either side and thoroughly scrutinised the materials available on record and also perused the impugned judgment of acquittal.

10.This is a case relating to an offence under Section 138 of the Negotiable Instruments Act. The dishonoured cheque, Ex.P.1 is in respect of an amount of Rs.6,00,000/-. The complainant claimed that he has given a loan of Rs.6,00,000/- to the accused and only towards the discharge of the said loan, the accused is said to have issued the disputed cheque, Ex.P.1, which is also not disputed by the accused. Regarding the formalities observed by the complainant in respect of the mandatory requirements contemplated under the Negotiable Instruments Act, the accused raised certain legal objections in this case viz., a non-production of pro-note, the non-serving of the statutory notice and the non-implication of the partnership firm viz., Southern Well Products, for which, the firm of the accused has claimed to have issued the cheque on behalf of the firm. The learned Magistrate has accepted all the three objections and rejected the case of the complainant and ultimately, acquitted the accused.

11.Now, let me consider the reasons assigned by the learned Magistrate for acquitting the accused as stated above.

12. The first reason on which, the order of acquittal was passed by the learned Magistrate is the non-serving of the statutory notice as contemplated under Section 138 of the Negotiable Instruments Act. It is seen that the statutory notice was sent through the advocate of the complainant. The sending of the notice is not disputed by the accused, but the accused disputed on the serving of the notice on him. It is pertinent to be noted that the accused has not disputed the address, for which, the complainant has sent the registered post and the registered post was returned with an endorsement in the cover viz., "not claimed". It is relevant to refer the well settled principles of law laid down by the Honourable Apex Court in a catena of decisions to the effect that once the statutory notice was despatched to the correct address of the accused, it has to be presumed that the said statutory notice was deemed to have been served.

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13. The Hon'ble Apex Court in V.Raja Kumari V. P.Subbarama Naidu reported in AIR 2005 SC 109 has held that,

> "11. In Maxwell's Interpretation of Statutes, the learned author has emphasised that "provisions relating to giving of notice often receive liberal interpretation" (vide p.99 of the 12th Edn.) The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in clause (b) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to 'make a demand' by giving notice. The thrust in the clause is on the need to 'make a demand'. It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is despatched his part is over and next depends on what the sendee does.
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> 12. It is well settled that a notice refused to be accepted by the addressee can be presumed to have been served on him (vide Harcharan Singh V. Shivrani (1981 (2) SCC 535) and Jagdish Singh V. Natthu Singh (1992(1) SCC 647)).
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> 13. Here the notice is returned as addressee being not found and not as refused. Will there be any significant difference between the two so far as the presumption of service is concerned ? In this connection a reference to Section 27 of the General Clauses Act, 1897 will be useful. The section reads thus :
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> > "27. Meaning of service by post – Where any Central Act or Regulation made after the commencement of this Act authorities or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, preparing and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

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14. No doubt Section 138 of the Act does not require that the notice should be given only by 'post'. Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service."

As far as the instant case is concerned, the fact remains that the accused has not disputed the correct address mentioned in the statutory notice and as such the statutory notice was sent by the complainant admittedly to the correct address of the accused and the same was returned with the endorsement in the cover as "not claimed" and as such the statutory notice was deemed to have been served on the accused. Therefore, the reason assigned by the learned Magistrate in respect of non-compliance of the mandatory provision of serving the statutory notice to the accused is unsustainable in law.

14. The next ground of acquittal is, the non-production of the pro-note. It is seen that the complainant stated that the loan amount was given on the basis of the pro-note. But the complainant has not produced the pro-note and therefore, it is contended that such non-production of pro-note is fatal to the prosecution case and on that ground, an adverse inference should be drawn against the version of the complainant on this aspect. It is relevant to be noted that the evidence of P.W.1 is remained to be unchallenged, as the accused has not chosen to cross-examine P.W.1 and P.W.1's evidence contains about the loan given to the accused firm and the accused accepting the liability and issued the cheque on behalf of the firm. Therefore, now the defence cannot contend that such non-production of pro-note is fatal to the prosecution case. The learned counsel for the appellant also has rightly placed reliance on a decision of the Andhra Pradesh High Court reported in 2006 Crl. L.J. Page 1, wherein, it was held that mere loss of demand of promissory note or its non-production by itself would not be sufficient to hold that there was no legally enforceable debt or liability. It is also important to note that once the accused is said to have issued a cheque, containing a signature, it has to be presumed that the cheque was issued only towards the legally enforceable liability as per presumption Clause under Section 139 of the Negotiable Instruments Act and as such it is for the accused to rebut the presumption. Therefore, this Court is constrained to state that even this ground is unsustainable in law.

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15. The last but not the least reason assigned by the learned Magistrate for acquitting the accused is, the non-impleading of the partnership firm viz., Southern Well Products, on whose behalf, the accused is said to have signed the cheque, Ex.P.1. in this case. It is well settled that in a proceedings initiated in respect of the company or a firm, the company or the firm need not be impleaded and it is suffice to implead the persons, who are all responsible and incharge of the day today affairs of the company. As far as the case in hand is concerned, the complainant has rightly impleaded the accused, who is none other than the Managing Partner of the company viz., Southern Well Products. Therefore, absolutely no prejudice is caused to the accused and there is no illegality in the proceedings initiated by the complainant against the accused.

16. The Honourable Apex Court also held in a decision reported in (2000) 1 SCC page 1, (Anil Hada Vs. Indian Acrylic Ltd.), wherein, it has been held that the offence committed by the company is the sine qua non for convicting the other persons, and such person cannot escape penal liability simply because the company is not prosecuted as a result of some legal impediment.

17. Therefore, this Court is constrained to state, in view of the reasons stated above, that the learned Magistrate has overlooked the materials available on record to implicate the accused for the offence under Section 138 of the Negotiable Instruments Act and the reasons assigned by the learned Magistrate is contrary to the facts as well as in law and as such, this Court is left with the inevitable conclusion to the effect that the impugned judgment of acquittal is unsustainable. Accordingly, this appeal is allowed and the impugned order of acquittal passed by the learned VIII Metropolitan Magistrate, Madras in C.C.No.4801 of 1993 by the judgment, dated 31.03.1997 is hereby set aside.

18. The learned counsel for the respondent, who is appearing as Legal Aid counsel pleaded leniency in respect of awarding sentence. It is submitted by the learned counsel that the transaction itself is said to have taken place as early as in the year 1993 and the accused also suffered heavy loss in his business and as such, leniency may be shown to the accused in respect of awarding sentence.

19. Considering the submission of the learned counsel for the respondent and also considering the admitted fact that the transaction itself is said to have taken place as early as in the year 1993, this Court is of the considered view that no useful purpose would be served by imposing the imprisonment of sentence on

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the accused. On the other hand, this Court is of the considered view that imposing a sentence of till rising of the courts and also directing the accused to pay an amount of Rs.6,00,000/- (Rupees Six Lakhs only) in respect of the dishonoured cheque, Ex.P.1, to the complainant within a period of three months from the date of receipt of a copy of this order would meet the ends of justice.

20. It is also made clear that as per the decision rendered by the Hon'ble Apex Court in Dilip S.Dahanukar V. Kotak Mahindra Co. Ltd. reported in (2007) 6 SCC 528 that the appellant is entitled to take effective steps as contemplated under Section 421 of the Criminal Procedure Code in the event of non-compliance of the direction of this Court to pay an amount of Rs.6,00,000/- (Rupees six lakhs only) in respect of the dishonoured cheque, Ex.P.1 to the complainant/appellant within a period of three months from the date of receipt of a copy of this order.

21. Before parting with this matter, this Court place it on record the commendable services rendered by Mrs.Juliet Pushpa, learned counsel appeared as legal aid counsel for the respondent. The learned counsel is entitled to receive a sum of Rs.2,500/- (Rupees two thousand five hundred only) from the Tamil Nadu Legal Services Authority, Chennai.

sd/-
Asst.Registrar

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Sub Asst.Registrar

jrl

To
1. The VIII Metropolitan Magistrate,
   Chennai.

2. -do- thro' The Chief Metropolitan Magistrate,
   Egmore, Chennai.

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3. The Secretary,
   Tamil Nadu Legal Services Authority,
   High Court, Chennai.

+1 cc To Mrs.Juliet Pushpa, Advocate, SR.75126
+1 cc To Mr. K.P.Anantha Krishna, Advocate, SR.74607

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